United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-1916

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
R
S

THE UNITED STATES JAYCEES, INC.
and NEW YORK STATE JAYCEES, INC.,

Appellants

v.

Docket No. 74-1916

THE NEW YORK CITY JAYCEES, INC.,

Appellees

BRIEF OF APPELLANTS

Robert J. Corber
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

Attorney for Appellants

OF COUNSEL:

Ronald S. Cooper
Virginia M. Dondy
Howard H. Stahl
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

1

TABLE OF CONTENTS

TABLE OF CASES

Page

STATUTORY AUTHORITIES

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE UNITED STATES JAYCEES, INC. and NEW YORK STATE JAYCEES, INC., Appellants	:	
v.	:	Docket No. 74-1916
THE NEW YORK CITY JAYCEES, INC., Appellees	:	

BRIEF OF APPELLANTS

STATEMENT OF ISSUES

1. Whether an internal policy restricting membership of a private organization, the Jaycees, on the basis of sex, formulated and enforced free of any government involvement, is subject to Fifth Amendment restrictions due to mere receipt by that organization of federal tax benefits, grants and contracts.

2. Whether a private civic organization, the Jaycees, incorporated in Missouri and maintaining its headquarters in Oklahoma, which exercises no control over separately incorporated local chapters, except for constitution and bylaw requirements, and which confers no agency powers on such chapters, is (a) doing business in New York by reason of collection of dues and

enforcement of constitution and bylaw requirements in respect to membership of local chapters and (b) maintains such minimal contacts with New York as would warrant subjecting it to personal jurisdiction in that state without offending due process standards.

STATEMENT OF THE CASE

This is one of two cases presently pending in the Federal courts on the question whether the United States Jaycees' policy limiting membership to males is unlawful sex discrimination in violation of the Fifth and Fourteenth Amendments to the United States Constitution. In the other case,[1/] the Tenth Circuit Court of Appeals has upheld a trial Court conclusion that there is no nexus or connection between government contracts, grants and tax exemptions and the internal membership policies of the Jaycees. Therefore, the Tenth Circuit reasoned, the so-called "state action" doctrine is not applicable and the Constitution does not forbid private action such as the internal membership policies of the Jaycees. The matter is now before the Supreme Court on petitions for certiorari.

1/ Junior Chamber of Commerce of Rochester, Inc., et al. v. The United States Jaycees, et al., 495 F.2d 883 (10 Cir. 1974), petitions for certiorari filed July 15, 1974.

In the case before this Court, the United States District Court for the Southern District of New York held, on a motion for preliminary injunction, that the state action doctrine does apply to the internal membership policies of the Jaycees and that those policies violate the Fifth Amendment. The trial Court thus disagreed with the Tenth Circuit, saying:

> To the extent that the opinion may be said to be a ruling on "state action" ... I note that the facts in that record are not clearly set forth. Moreover, if the record in the District Court in Oklahoma is substantially the same as that in this Court, then I must respectfully disagree with that part of the opinion. (Opinion of District Court, p. 24, fn. 34). 2/

1. The Proceedings Below

The complaint alleges that plaintiff has a charter as a local chapter of the United States Jaycees and the New York State Jaycees. It further alleges that on May 31, 1973 it amended its local bylaws to admit women to membership. Thereafter, the United States Jaycees ordered plaintiff to show cause at a meeting scheduled in Tulsa, Oklahoma for February 16, 1974 why its charter should not be revoked for adoption of

---

2/ In the Supreme Court petitions for certiorari to the Tenth Circuit the petitioners (plaintiffs in the trial Court) contend that, indeed, the records are substantially the same and that the Tenth Circuit should have reached the same conclusion as the Southern District of New York in this case. (The Opinion of the District Court, reproduced in the Appendix, is hereafter identified as "Opinion" followed by the page number.

a bylaw inconsistent with the bylaws of the United States Jaycees. Injunctive relief against the threatened revocation was sought.

Subject matter jurisdiction is alleged in the complaint under 28 U.S.C. §§ 1331 and 1343; under 42 U.S.C. §§ 1981, 1983 and 2000(d); and under the New York Executive Law. It is further alleged that the action arises under the Fifth and Fourteenth Amendments to the United States Constitution. The Court below held that since the gravamen of the action is alleged federal governmental action sponsoring sex discrimination that 42 U.S.C. §§ 1981, 1983 and 2000(d) are not applicable. Jurisdiction was sustained pursuant to 28 U.S.C. § 1331 as "arising under" the Fifth Amendment.

The trial Court issued a temporary restraining order on February 11, 1974 which was extended by consent of defendants pending consideration of plaintiff's motion for preliminary injunction. The plaintiff contended in support of the motion that contracts, grants and tax exemptions received by the United States Jaycees from the federal government made the "state action" doctrine applicable and that it would be irreparably damaged by revocation of its charter. The defendants argued that the contracts and grants provided funds for discrete projects from which benefits were extended the public without discrimination of any kind; that there was no connection between government funds and the internal membership

policies of the United States Jaycees; that tax exemptions are not government sponsorship of such internal membership policies; and that the government was not involved in such policies.

An evidentiary hearing was held on April 9, 1974 on the motion for preliminary injunction. Plaintiff and defendants presented evidence at the hearing. Thereafter, on June 13, 1974, the Court issued its opinion and order granting the plaintiff's motion.

2. The Evidence

The evidence showed that federal funds do not sustain the general operations of the Jaycees. Such funds are limited to specific projects with expressed objectives serving community needs. The Jaycees is merely a conduit for such funds. The government has no voice, and attempts to exercise none, in the internal workings of the Jaycees organization. It has not intervened in any way in the internal membership policies of the organization.

On the other side of the coin, the evidence shows that the Jaycees' membership policies are not involved in the specific projects which are funded by the federal government. Women participate in these projects at all stages and there is no discrimination of any kind among beneficiaries.

The United States Jaycees is a national organization with a professional staff, including female managers, in a building in Tulsa, Oklahoma which is privately owned. (Def. Roper, Tr. 45, 48, 72-73).[3/] It exerts no control over affiliated state and local chapters except that the constitution and bylaws of such affiliates may not conflict with the constitution and bylaws of the national organization (Def. Roper, Tr. 47-48).

The purpose of the national organization is to provide services to affiliated state organizations and local chapters (Def. Roper, Tr. 49). Although at one time its sole purpose was to promote business interests of its members, in recent years it has broadened its membership and its program emphasis is now on community services (Def. Roper, Tr. 49-50).

One of its affiliations is with the autonomously functioning United States Jaycees Foundation (Def. Roper, Tr. 50). The Foundation, which is not a defendant in this action, was established in 1964 and is governed by a self-perpetuating Board of seven trustees (Def. Roper, Tr. 50-54). It is not

---

3/ References to the transcript of the oral hearing, reproduced in the Joint Appendix, are identified by indicating the party on whose behalf testimony was offered (i.e., Pl. or Def.), the name of the witness (i.e., Roper, Washington, Warfield) and the page number.

limited to fund raising for the United States Jaycees and has in fact raised funds for other organizations (Def. Roper, Tr. 52). It reports annually to the Executive Board of Directors of the United States Jaycees (Def. Roper, Tr. 53).

As the Court found, the first year that the United States Jaycees received any federal funds was the fiscal year ended July 1, 1973. In the 1974 fiscal year the budget totals $3,639,000. Federal funds account for $1,143,000 or 31.4% and the remaining $2,496,000 is derived from private sources. Of the federal funds, $545,085 is received directly from the federal government and the remainder is obtained from the Foundation. (Opinion, p. 6).

Three of the federal contracts generating funds disbursed by the Jaycees are with the Foundation rather than the U. S. Jaycees. They are the $574,000 grant for Project Mainstream, awarded by the Office of Economic Opportunity (Def. Exh. A);[4/] $21,500 for environmental education, funded to the extent of 19% of the total by the Department of Health, Education and

---

4/ Exhibits received in evidence at the oral hearing are identified by the party sponsoring the exhibit and the number or letter designation assigned at the hearing. Exhibits are reproduced in the Joint Appendix.

Welfare (Def. Exh. B); and the Criminal Justice Program which is financed in the amount of $325,363 by the Manpower Administration of the Department of Labor (Def. Exh. C).

The United States Jaycees is a party to the other two federal contracts. One is for control of venereal disease and it was issued in the amount of $99,923 by the Center for Disease Control of the Department of Health, Education and Welfare (Def. Exh. D). The other is for prevention of alcohol abuse and it was awarded by the Public Health Service of the Department of Health, Education and Welfare for $445,162 (Def. Exh. E).

The largest and most significant award is for Project Mainstream. Its purpose is to develop successful self-help programs by community action agencies at the local level (Pl. Exh. 4; Def. Roper, Tr. 60-61). It is a human improvement program, dealing with economic development, community relations, housing, elderly assistance, recreation and the like (Def. Roper, Tr. 60-61; Pl. Exh. 4, p. 1). The New York City project, in which plaintiff is participating, is for recreation and federal funds are used for administrative support, rent, and the provision of coaches and referees (Pl. Warfield, Tr. 5-6).

The Foundation disburses the funds for this project. $152,465 goes to the United States Jaycees, none of which is for indirect administrative costs (Def. Roper, Tr. 89; Def. Exh. A). $196,535 is paid to a consulting organization,

hereafter described in greater detail, known as Together, Inc. (Def. Roper, Tr. 89). The remaining $225,000 is earmarked for so-called "seed" grants for local organizations (Def. Roper, Tr. 89). The seed grants are paid by the Foundation after designation of the recipient by Together, Inc. (Pl. Washington, Tr. 25-26). The plaintiff, in partnership with a local community action agency, has received a grant of $4500 under this program (Pl. Warfield, Tr. 4; Pl. Exh. 1).

Together, Inc. is a separately incorporated organization which has a consulting arrangement with the Foundation (Pl. Washington, Tr. 37-38; Pl. Exh. 5). It is responsible for coordination and supervision of the implementation of Project Mainstream (Pl. Exh. 5). As a part of its duties it renders periodic reports to the government, the United States Jaycees and the Foundation (Pl. Washington, Tr. 32-36). It also selects local Jaycee chapters and community action agencies for awards of seed grants (Pl. Washington, Tr. 24-25). These selections are made by a National Advisory Council which is a part of Together, Inc. (Pl. Washington, Tr. 24; Pl. Exh. 5, pp. 5-6).

The National Advisory Council has sixteen members, four of which are representatives of the United States Jaycees (Pl. Exh. 3). There are three representatives of community action agencies, four representatives of federal agencies,

and five other representatives, including the Lilly Endowment and the Corporation for Public Broadcasting (Pl. Exh. 3). Four of these representatives are women, including plaintiff's witness Washington (Ibid.).

The Council reviews applications for subgrants (i.e., "seed" grants) and then the members "decide who should get funding, who should not get funding, or if we have enough funds, if the [local] programs are relevant to what we are trying to do." (Pl. Washington, Tr. 26). The Council has exclusive control of selections for funding and the United States Jaycees "really have nothing to do with it." (Pl. Washington, Tr. 40). All members of the Council have an equal voice in its deliberations (Pl. Washington, Tr. 31). The federal government has "no say at all as to what" the Council and Together, Inc. do except that four of its representatives sit on the Council and periodic reports are rendered (Pl. Washington, Tr. 26, 30; Pl. Exh. 3).

Women participate in the projects financed by federal funds in a variety of ways, including roles as consultants, managers, staff and beneficiaries. This was emphasized by the testimony of Miss Washington, who appeared as plaintiff's witness.

Miss Washington is joined on the National Advisory Council by three other women and all have an equal voice in the selection of recipients for seed grants. Although it was Miss

Washington's view that awards must be limited to "a Jaycee chapter working in conjunction with a community action agency" she was unable to point to any source limiting funds to male organizations (Tr. 40) and, in any case, community action agencies include women among their membership. (Def. Roper, Tr. 64-65). The six-month report of Together, Inc. presented by plaintiff states that "Project Mainstream" is a joint action endeavor involving community action agencies and other community based organizations, as well as Jaycees, and that "grant applications were mailed to local chapters and other organizations soliciting their applications ..." (Pl. Exh. 4, pp. 1 and 5). Participation in the program thus includes women and the District Court did not find to the contrary.

The contract with the Office of Economic Opportunity expressly prohibits sex discrimination (Def. Roper, Tr. 64; Def. Exh. A, General Conditions, Section 6). There is compliance with this provision since women participate in the program (Def. Roper, Tr. 65). More importantly, attorneys for the Office of Economic Opportunity investigated and found that there is no sex discrimination in the implementation of the grant. (Def. Roper, Tr. 66). All of the benefits of the grant are distributed without regard to sex, race, or other such characteristics (Def. Roper, Tr. 61).

Women participate in the management of Together, Inc.

as well as serve on the Advisory Council (Def. Roper, Tr. 61). Women also hold management and other staff positions in the headquarters of the United States Jaycees (Def. Roper, Tr. 72-73).

Indeed, women participate in all of the programs of the United States Jaycees. They serve as project chairmen (Def. Roper, Tr. 85). They are members of auxiliary groups which are "intimately involved in Jaycee projects." (Def. Roper, Tr. 85). A subgrant has been awarded to a women's group under the alcohol program (Def. Roper, Tr. 72). They participate in the Criminal Justice Program (Def. Roper, Tr. 72) and in the Environmental Improvement Program (Def. Roper, Tr. 68-69).

3. The Decision Below

The findings of basic facts by the District Court are consistent with the evidence presented by defendant as well as plaintiff. It did not find that women do not participate in Jaycee programs. It did not find that the government influences, encourages, or in any way dictates the internal membership policies of the Jaycees. It did not find that there is any discrimination in the disbursement of benefits of the programs funded by the government.

Instead the Court concluded that "no logical reason has been offered ... why women cannot be full Jaycee members ..."

(Opinion, p. 16). Finding no "... single action of the federal government as the inducing cause of the revocation of the plaintiff's charter ..." the Court nevertheless concluded that "the congeries of factors here involved make the action of the United States Jaycees in attempting to revoke the charter of the New York City Chapter 'state action' and subject to the jurisdiction of the federal courts." (Opinion, pp. 20-21).

In support of its conclusion the Court held that "sex ... [is] a suspect class not only in the test of what is discrimination but in the tilting of the scale in what constitutes state action." (Opinion, p. 20). The Court added that the government was in a positicn of interdependence with the Jaycees which made it a "joint participant" in the challenged activity and that the Jaycees perform public functions (Opinion, pp. 21-22). Finally, it held that "by failing to enforce as a condition of the grant that the offending by-laws of ... [the United States Jaycees] be nullified, the Federal Government would appear to the public to have approved discrimination based on sex in connection with the very activities funded in aid of the public function." (Opinion, p. 23).

The Court further held that the United States Jaycees are doing business in the State of New York and are, therefore, subject to process under N.Y.C.P.L.R. § 301. The

defendants' motion to dismiss pursuant to Rule 12(b)(2), F.R.C.P., was accordingly denied.

ARGUMENT

I. THE DISTRICT COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN FINDING STATE ACTION

Despite the District Court's recitation of the admonition that it is only by "sifting facts and weighing circumstances"[5/] that the question of state involvement can be determined, that Court made no analysis whatsoever of the relationship between the government and the Jaycees in this case. The District Court did not, and could not, conclude that the government was involved in the internal membership policies of the Jaycees. Rather, as its decision indicates, the Court began with the premise that there is no logical reason why women should not be Jaycees members, then progressed to the holding that sex is a suspect classification, and from there reached the decision that a "congeries" of factors leads to the conclusion that state action is present. (Opinion, pp. 16, 20). The District Court's holding is not in conformity with the applicable law.[6/]

5/ Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961)

6/ At the outset it may be observed that the Supreme Court has declined to treat sex as a suspect classification. See, Kahn v. Shevin, ____ U.S. ____, 94 S.Ct. 1734 (1974); Geduldig v. Aiello, ____ U.S. ____, 94 S.Ct. 2485 (1974). Accordingly, to the extent the District Court based its decision on this conclusion, it plainly erred.

This case does not involve allegations of discrimination among the beneficiaries of the programs funded by the government. Rather, the challenge here is to the internal membership policies of the Jaycees. The issue thus presented is whether the government is so significantly involved in the membership policies of the Jaycees that such policies have become subject to Fifth Amendment strictures. Proper resolution of this issue requires careful analysis of the relationship between the government and the Jaycees -- an analysis not made by the District Court. Jackson v. Statler Foundation, 496 F.2d 623 (2 Cir. 1974); Wahba v. New York University and Severo Ochoa, 492 F.2d 96 (2 Cir. 1974); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2 Cir. 1973); Powe v. Miles, 407 F.2d 73, 81 (2 Cir. 1968); Grossner v. Trustees of Columbia University, 287 F. Supp. 535, 548 (S.D. N.Y. 1968).

In Grossner, supra, the Court held that receipt of money from the state "is not, without a good deal more, enough to make the recipient an agency or instrumentality of the Government." Otherwise, said the Court:

> ... [A]ll kinds of contractors and enterprises, increasingly dependent upon government business for much larger proportions of income than those here in question would find themselves charged with "state action" in the performance of all kinds of functions we still consider and treat as essentially "private" for all presently relevant purposes. (287 F. Supp. at 548).

It was held that even though forty percent of Columbia University's budget was supported by government funds there was no "state action." The Court further held that it must be shown that the state is "involved as a participant" in the alleged wrong and that no such showing was made. 287 F. Supp. at 548. The critical "involvement" must be "in the very 'discriminatory action' under constitutional attack." Id.

In Powe v. Miles, supra, this Court held that state action under 42 U.S.C. § 1983 was not present, even though the state funded 20.75% of the defendant university's budget. The Court said:

> ... [T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of complaint. (407 F.2d at 81, emphasis added).

In other words, there must be some connection between the government and the complained of activity in order to find state action. As only recently stated by the United States Supreme Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972), "the State must have 'significantly involved itself with invidious discriminations'... in order for the discriminatory action to fall within the ambit of the constitutional prohibition." The Tenth Circuit has also held that for state action to exist there must be a nexus between the government

and the alleged wrong. Browns v. Mitchell, 409 F.2d 593, 596 (10 Cir. 1969); Ward v. St. Anthony Hospital, 476 F.2d 671 (10 Cir. 1973). Indeed, this was the very basis for that Circuit's decision that the internal membership policies of the Jaycees do not fall within the ambit of the state action doctrine. Junior Chamber of Commerce of Rochester, Inc., et al. v. The United States Jaycees, et al., supra, 495 F.2d at 887.

The principles of Powe and Grossner were recently reaffirmed in Wahba v. New York University and Severo Ochoa, supra, where this Court refused to find state action in a university project funded almost entirely by the government. The Court formulated a three-part test to apply in such cases, saying:

> ... [D]etermination of government action in such cases as this hinges on the weighing of a number of variables, principally the degree of government involvement, the offensiveness of the conduct, and the value of preserving a private sector free from the constitutional requirements applicable to government institutions (492 F.2d at 102).

Applying these variables in this case, it is apparent that the District Court's state action conclusion is wrong. First, the involvement of the government here is with specific projects underwritten with federal funds. There is no discrimination in the distribution of benefits in those projects. The challenge here goes to the internal membership policies of the Jaycees. However, the government does not participate in

adoption or implementation of these policies. Nor are the internal operations of the Jaycees funded by the government. Accordingly there is even less government involvement with the challenged activity in this case than there was in Wahba, supra. Second, there is social value in the work of the Jaycees, and the Jaycees will obviously be discouraged from continuing a relationship with the government if they are subjected to constitutional requirements applicable to government institutions. Wahba, supra, at 102. Third, the Jaycees' policy of limiting its membership to males is clearly no more offensive than the racially restrictive Moose Lodge policy sustained in Irvis, supra.

The five part strict-scrutiny test announced by this Court in Jackson v. Statler Foundation, supra, at 629, is expressly limited to cases of racial discrimination. Nevertheless, as the Jaycees is not dependent on federal funds, is not subject to regulation in its internal operations and does not discriminate in distributing the benefits of the government projects, which are separate from the Jaycees' internal operations, there is no "state action" here even under Jackson's strict-scrutiny test prescribed for racial discrimination. 7/

7/ The District Court did not attempt to apply the Jackson formula or to consider the effect of tax exemptions enjoyed by the Jaycees. (Opinion, p. 24). It is clear, in any event, that tax exemptions do not involve sponsorship by the government or make the recipient institution an arm of the government. See, Walz v. Tax Commission, 397 U.S. 664 (1970); Marker v. Shultz, 485 F.2d 1003, 1006-1007 (D.C. Cir. 1973); McCoy v. Shultz, 73-1 U.S.T.C. ¶ 9233 (D.D.C. 1973).

A proper "sifting of the facts and weighing of the circumstances" in this case demonstrates that while the government funds specific projects which are implemented without discrimination by the Jaycees, the government neither supports nor participates in the formulation or enforcement of the internal membership policies of the Jaycees. As this Court stated in Powe, supra, it is not enough that the government is involved in some activity of the institution alleged to have inflicted injury; it must be shown that the government is involved in the particular activity that caused the injury. No such showing was made in this case or found by the District Court. Under the circumstances, state action is wholly lacking.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THERE IS A PARTNERSHIP RELATIONSHIP BETWEEN THE JAYCEES AND THE GOVERNMENT

The Court below relied upon Burton v. Wilmington Parking Authority, supra, for the conclusion that there is a partnership or joint participation relation between the government and the Jaycees (Opinion, p. 21). The difference in the cases is crucial. In Burton the restaurant in the public parking building discriminated in the delivery of services to the public. There is no such discrimination here. If Burton had concerned the makeup of the ownership of the restaurant rather than delivery of services to the public, it might have served as an analogy to this case. It did not, however, and there is

nothing in Burton nor in the Supreme Court's more recent inquiry into the question, Moose Lodge No. 107 v. Irvis, supra, which supports extending a finding of government-Jaycee partnership to an activity of the Jaycees in which the government is not, and never has been, involved.[8/]

For similar reasons, the Court's reliance upon Male v. Crossroads Associates, 469 F.2d 616 (2 Cir. 1972) is misplaced (Opinion, p. 19). In that case a privately operated apartment complex built on an urban renewal site prepared and financed by a government urban renewal agency and closely regulated for conformity to government urban renewal standards, denied leases to welfare recipients. The Court concluded, on the basis of Burton, that the apartment lessor "not only had a symbiotic

---

8/ The District Court opinion completely ignores the importance of the distinction between a public and a private function articulated by Justice Rehnquist in Moose Lodge:

> ... [W]hile Eagle [the restaurant in Burton] was a public restaurant in a public building, Moose Lodge is a private social club in a private building. 407 U.S. 175.

Accordingly, where as here, the organization is private, it operates from a privately owned building, and the internal functions of the organization are privately financed, there is lacking the public quality which Moose Lodge finds necessary in according priority to equal protection principles over property and associational rights of a private organization. See generally, Note "State Action and the Burger Court," 60 Va. L. Rev. 840, 849-51 (1974).

relationship with the state ... but owed its very existence to state action." 469 F.2d at 621. The Court added that the state had a "demonstrated intention to regulate the tenant selection procedures at the ... apartments as evidenced by the anti-discrimination clauses in the ... agreement" between the urban renewal agency and the apartment owner. Id. at 622. There was, in other words, a direct connection between government involvement and the very discrimination alleged. As previously noted, there is no such connection here. Neither is there any discrimination among the beneficiaries of the programs partially funded by the government nor do the Jaycees owe their existence to government funding. If Male v. Crossroads Associates had involved a challenge to the race or sex composition of the apartment lessors, only then might it have any application to this case.

The absence of a partnership is affirmatively established in this case by the independent contractor status of the Jaycees. Powe, supra, at 83. In Wahba, supra, at 100 n. 3, the plaintiff contended there was a partnership between the government and the university project in which he was employed, citing the Policy Statement in the contract which referred to the "special relationship with the Public Health Service for the utilization of grant funds ..." and "a mutual joining of interests on the part of the grantor and the grantee institution in the pursuit of a common objective." Holding that the project itself was

not affected by state action, this Court concluded that "there was here no partnership or joint venture in the ordinary meaning of those words." Id. at 100. In this case the District Court found a joint venture, not only in the specific projects funded by the government, but also between the parent institution (the Jaycees) and the government. The idea that New York University, the parent institution, as distinguished from the research project, was a joint venturer with the government was not even urged or considered in Wahba. The rejection in that case of joint venture for the project itself underscores the errant excessiveness of the District Court's holding here that the Jaycees, which stands in the position of New York University in Wahba, is in partnership with the government.

The evidence of both parties in this case demonstrates that administration and management of the specific projects funded by the government are the responsibility of the grantees and are not shared with the government, as would be the case in a partnership. Plaintiff's witness Washington testified in regard to Project Mainstream that " ... the only thing we do with the federal government is send them reports every six months ..." (Tr. 26). Defendants' witness Roper confirmed that the government does not share in the administration or

management of the other projects. (Tr. 76-77).[9/]

There is, of course, a relationship of mutual interest with the government as there was in Wahba. However, responsibility for program content, administration, management and performance is with the grantees and contractors. The government reviews the program, awards the funds, monitors or reviews performance and receives reports. These are the functions of a grantor, consistent with assuring that funds are expended for the purposes intended but not consistent with the kind of participation in management and administration that inheres in a joint venture or partnership relation.

Moreover, the government grants and contracts contain provisions similar to contracts used throughout the government for construction, acquisition of goods and other purposes. Such provisions, even when giving the government more control than here, are regularly considered to create the status of independent contractor. See, United States v. Boyd, 378 U.S. 39, 48 (1964); Compudyne Corporation v. Maxon Construction

9/ The Statement of Work for the Criminal Justice Program provides that:

> The Contractor, the U. S. Jaycees Foundation, will be responsible for administering a program to provide technical assistance to the U. S. Jaycees membership. The Contractor will subcontract with the U. S. Jaycees staff (Criminal Justice Program), who will in turn subcontract with CONtact, Inc. of Lincoln, Nebraska to implement and operate this program. (Def. Exh. C, p. 2).

The Venereal Disease contract contains comparable language (Def. Exh. D, p. 3). Similar language in the contract in Wahba was cited by the Court in support of its holding that joint venture or partnership was absent. (492 F.2d at 100).

Company, 248 F. Supp. 83, 87 (E.D. Pa. 1965); D. R. Smalley & Sons v. United States, 178 Ct. Cls. 593, 597-598 (1967).

III. THE DISTRICT COURT MISAPPLIED THE PUBLIC FUNCTIONS ARGUMENT

The District Court appears to have supported its state action holding by the assertion that the Jaycees do "good deeds ... generally thought of as public functions" (Opinion, p. 22). The logical fallacy of this reasoning is that this case concerns not the socially useful public projects of the Jaycees but its internal membership policies. In short, it does not encompass what the Court labelled the public functions of the Jaycees. If a member of the public complained of being excluded from the Jaycees' alcohol abuse program, for example, the Court's reasoning might be relevant. However, the issue is not whether these public programs are operated without discrimination, it is whether the make-up of the Jaycees organization is open to constitutional challenge. The Court's reasoning is not relevant to that question.[10/]

The public functions argument grows out of the Supreme Court's decisions in Marsh v. Alabama, 326 U.S. 501 (1946), and Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). In Marsh the officials of a company-owned town attempted to prevent distribution of religious literature on the streets of the town. In Logan

---

10/ See footnote 8, supra.

Valley Plaza unionized employees picketed a non-union store in a privately owned shopping center. Both activities were held subject to First and Fourteenth Amendment rights. These decisions are distinguished by the Supreme Court in Lloyd Corporation, Ltd. v. Tanner, 407 U.S. 551 (1972), where it was held that distribution of handbills unrelated to the purposes of a shopping center was not within the privileges of the First Amendment. The Court said that Marsh must be restricted to its facts, viz., a company town that serves the function of any other municipality and must be treated accordingly. Logan Valley Plaza was similarly limited to picketing directly related to the use to which the shopping center property was being put. 407 U.S. at 562-564.

The most that can be drawn from these authorities is that a property dedicated to a public use is subject to constitutional restraints applicable to governments insofar as that use is concerned. This may be applied to the public projects of the Jaycees to prevent discrimination in the delivery of services by such projects, but it cannot rationally be applied to their internal membership. Neither Marsh, Logan Valley Plaza nor Lloyd Corporation deals with the ownership make-up of the proprietors. However, it is the make-up of the Jaycees which is in dispute here.

This Court has refused to apply the public functions argument to universities, Powe, supra, at 80; Grafton v.

Brooklyn Law School, supra, at 1140-1141, even though such institutions serve public purposes. The same result is required in this case - although the Jaycees may serve some public purposes, in their internal membership policies they exercise no governmental functions.

The District Court further erred in finding that the National Advisory Council, which has four of sixteen members who are representatives of government agencies, is in "control" of the Jaycees (Opinion, p. 23). The undisputed facts are that the Council is an arm of Together, Inc. which is a separate corporation, independent of the Jaycees, and serves as a consultant to the United States Jaycees Foundation, also a separate independent organization. (Pl. Exh. 5; Pl. Washington, Tr. 37-38). The Council is three steps removed from the Jaycees (after Together, Inc. and the Foundation) and does not control even the general functions of the Jaycees, let alone its membership policies which are the only functions in issue in this case. It is solely responsible for the selection of recipients for seed grants in Project Mainstream. It has no involvement in the internal membership policies of the organization. To the extent the District Court has made a finding that the Council controls the Jaycees, and accordingly that the government is involved in the Jaycees' internal membership policies because it votes on the Council, the

finding is clearly erroneous. See Rule 52(a), F.R.C.P.; United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Sears Roebuck & Co. v. Johnson, 219 F.2d 590, 591 (3 Cir. 1955).

IV. THE DISTRICT COURT ERRED IN HOLDING THAT THE GOVERNMENT COULD CONTROL THE INTERNAL MEMBERSHIP POLICIES OF THE JAYCEES

The only other support suggested by the District Court for its state action holding is that the government could control the internal membership policies of the Jaycees and, therefore, must be deemed to have approved such policies (Opinion, p. 23). There is no doubt that the government is in a position to control the terms and conditions of grants and contracts for specific projects in which the Jaycees participate. It has for example, as the Court points out, imposed a condition in the OEO grant against discrimination, including sex discrimination. That condition, however, relates to Project Mainstream, itself, and not to the internal membership policies of the Jaycees. In addition, the undisputed testimony of Mr. Roper in this case is that OEO investigated and concluded that the federal anti-discrimination condition was not being violated by the Jaycees (Def. Roper, Tr. 66).

These facts do not lead to the conclusion that the government can dictate membership terms to the Jaycees or that it

has approved the membership of the Jaycees. The Jaycees, as previously noted, is an independent contractor and, as such, is not accountable to the government for membership. If the District Court decision were to stand, the government could never contract with any organization - such as the Black Muslims, the Mormons, the Girl Scouts or other exclusive organizations - which has a membership made up different from a constitutionally ideal society.[11/]

V. THE TRIAL COURT ERRED IN HOLDING THERE IS PERSONAL JURISDICTION OVER THE UNITED STATES JAYCEES

The trial Court held that the United States Jaycees is doing business in New York and, as such, is subject to process pursuant to N.Y.C.P.L.R. § 301. (Opinion, pp. 11-14). It declined to hold this defendant subject to jurisdiction under N.Y.C.P.L.R. § 302. (Opinion, p. 11).

The facts recited by the Court for its § 301 holding are that:

11/ The Court quotes from McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972), aff'd sub nom, Coit v. Green, 404 U.S. 997 (1971), holding that tax exemptions for charitable contributions and income of non-profit clubs imply approval of the organizations holding the exemptions, as support for its government approval holding in this case (Opinion, p. 24). That part of the McGlotten decision has been severely criticized in Bittker & Kaufman, Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code, 82 Yale L. J. 51, 68-74 (1972). In any case, that part of the decision has not received judicial support in non-racial contexts. See, Marker v. Shultz, supra, 485 F.2d at 1006-1007; McCoy v. Shultz, supra.

> National [U.S. Jaycees] receives dues from the New York Chapter [through the state organization defendant] and solicits participation on projects such as Mainstream with the New York Chapter. It awards "seed" subgrants for its projects to combat alcoholism for execution by the New York chapter. It enforces its membership policies and decrees incidental to its management to insure that no women can join. (Opinion, p. 13).

What it did not recite are the undisputed facts that the United States Jaycees is separately incorporated as is the plaintiff New York City Chapter. (Opinion, p. 4). Nor did it recite the undisputed fact that the New York Chapter is not empowered to act as agent for or otherwise represent the United States Jaycees (Def. Roper, Tr. 48; Roper Affidavit, Feb. 27, 1974, U. S. Jaycees Bylaw 18-4). It further failed to mention the uncontroverted fact that the United States Jaycees exerts no control over the local chapters, including plaintiff, except that the constitution and bylaws of such affiliates may not conflict with the constitution and bylaws of the national organization (Def. Roper, Tr. 47-48). Finally, it failed to consider the agreed fact that the United States Jaycees maintains no office in New York.

Defendants agree with the Court's conclusion that the same tests of doing business apply to non-stock membership corporations, such as the parties to this case, and stock corporations engaged in commerce (Opinion, p. 12). The leading decision on "doing business" in New York is Delagi v.

Volkswagenwerk A. G. of Wolfsburg, Germany, 29 N.Y.2d 426, 328 N.Y.S.2d 653, 278 N.E.2d 895 (1972).

In Delagi it was held that there are two theories by which a foreign corporation may be held to be doing business in New York. One is if the parent organization exerts control over the subsidiary which is "so complete that the subsidiary is, in fact, merely a department of the parent." The second is if the relationship between the foreign parent and local subsidiary gives rise to a "valid inference" of "an agency relationship." The agency relationship must be such that the subsidiary does all the business which the parent could do if it were present in New York by its own officials. Frummer v. Hilton Hotels International, 19 N.Y.2d 533, 537, 281 N.Y.S.2d 41, 44, 227 N.E. 2d 851, 854 (1967).

By these tests it must be held that the United States Jaycees is not doing business in New York. In Delagi the New York Court of Appeals refused to find the foreign parent (automobile manufacturer) present even though it exerted the following control over its representatives (dealers and distributors) in New York:

> (1) sale by each dealer of a minimum number of automobiles upon penalty of forfeiture of their dealer franchise; (2) uniform design for dealer service departments; (3) service personnel to be trained in Germany; (4) uniform purchase and sales prices, and (5) prior approval of prospective dealers. (278 N.E.2d at 897).

Clearly the United States Jaycees do not begin to exert this much control over the plaintiff local chapter.

If, then, there is to be a holding of doing business in New York it must come from an agency relationship between the two corporations. The trial Court pointed to the fact that the local chapter remits dues to the United States Jaycees, through the defendant state organization (Def. Roper, Tr. 81). In Grammenos v. Lemos, 457 F.2d 1067 (2 Cir. 1972), it was held that a local corporation (Triton) which collects funds for a foreign corporation (Nile) does not function as an agent subjecting the foreign corporation to jurisdiction in New York. This Court said:

> But Triton is in essence a collection agency, and monies are passed on to the principals as soon as possible. Triton does not exercise discretionary power; it is a subagent of Nile in one area for certain specific tasks, but is not the entity with overall authority for Nile's activities in the United States. (457 F.2d at 1073).

Thus, the mere collection of dues for the United States Jaycees does not create an agency relationship for jurisdictional purposes and any agency must give the local corporation "overall authority" for the foreign corporation's activities in New York. Plaintiff clearly lacks such authority and there is no agency relationship that confers jurisdiction in New York over the United States Jaycees.

The trial Court relies upon a 1924 decision in the First Department for authority that the United States Jaycees

is doing business in New York. B. K. Bruce Lodge, Inc. v. Subcommittee of Management of the Grand Order of Odd Fellows in America, 208 App. Div. 100 (1st Dept. 1924). In that case it was held that the national parent corporation of the Odd Fellows was doing business in New York because it "appears ... that said defendant in this State enforces its policies, decrees and orders incidental to its management, and collects dues through the instrumentality of the defendant District Grand Lodge No. 2" (208 App. Div. at 102). The decision does not recite the extent control was exercised by the parent over the local lodge or any agency powers that might be held by the local lodge. Until such facts are disclosed it could not be determined whether the decision is consistent with Delagi and its line of decisions. In any case, this early decision by a lower court cannot take precedence over the 1972 decision of the New York Court of Appeals in Delagi. It cannot serve as authority for a holding of doing business in this case.

An additional factor not mentioned by the trial Court but asserted by the United States Jaycees defendant is the lack of even "minimal contacts with the state, sufficient to warrant subjecting it to suit there without offending due process standards." Grammenos v. Lemos, supra, 457 F.2d at 1072. The only contact the United States Jaycees has with New York is the collection of dues and the provision of services to

local chapters. Without maintaining an office or having any other business activity in the state, it cannot be held that the collection of dues and provision of some miscellaneous services are sufficient to warrant suit here consistent with due process standards. See, International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945); Hanson v. Denckla, 357 U.S. 235, 253 (1958). On this additional ground the lower court erred in not granting defendant's motion to quash service of process and dismiss the complaint against the United States Jaycees.

CONCLUSION

The trial Court lacked jurisdiction of the subject matter of this suit and jurisdiction in personam of the United States Jaycees. It should have denied plaintiff-appellee's motion for preliminary injunction and granted the motion to quash service of process and dismiss the complaint. Accordingly, it is respectfully submitted that the decision should be reversed.

Respectfully submitted,

Robert J. Corber
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

Attorney for Appellants

Of Counsel:

Ronald S. Cooper
Virginia M. Dondy
Howard H. Stahl
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE UNITED STATES JAYCEES, INC.
and NEW YORK STATE JAYCEES, INC.,

Appellants

v. cket No. 74-1916

THE NEW YORK CITY JAYCEES, INC.

Appellees

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served the Brief for Appellants and the Joint Appendix on the appellee by causing copies thereof to be mailed, postage prepaid and properly addressed, to counsel for appellee as follows:

Sheila Maura Kahoe, Esq.
Doman & Beggans
295 Madison Avenue
New York, New York 10017

Robert J. Corber
Counsel for Appellants

September 16, 1974

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE UNITED STATES JAYCEES, INC.
and NEW YORK STATE JAYCEES, INC.,

Appellants

v. Docket No. 74-1916

THE NEW YORK CITY JAYCEES, INC.

Appellees

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served the Brief for Appellants and the Joint Appendix on the appellee by causing copies thereof to be mailed, postage prepaid and properly addressed, to counsel for appellee as follows:

Sheila Maura Kahoe, Esq.
Doman & Beggans
295 Madison Avenue
New York, New York 10017

Robert J. Corber
Counsel for Appellants

September 16, 1974

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE UNITED STATES JAYCEES, INC.
and NEW YORK STATE JAYCEES, INC.,

Appellants

v. cket No. 74-1916

THE NEW YORK CITY JAYCEES, INC.

Appellees

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served the Brief for Appellants and the Joint Appendix on the appellee by causing copies thereof to be mailed, postage prepaid and properly addressed, to counsel for appellee as follows:

Sheila Maura Kahoe, Esq.
Doman & Beggans
295 Madison Avenue
New York, New York 10017

Robert J. Corber
Counsel for Appellants

September 16, 1974